United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

2nd Circuit

To be argued by
P. G. PENNOYER, JR.

74-1915

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

P/S

Docket No. 74-1915

HARRY S. SAMUELS,

Plaintiff-Appellant,

-against-

ARMSTRONG CORK COMPANY,

Defendant-Appellee.

Appeal from Part of a Judgment of the United States District Court for the Southern District of New York

BRIEF FOR ARMSTRONG CORK COMPANY, DEFENDANT-APPELLEE

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2

TABLE OF CONTENTS

I

TABLE OF CASES AND STATUTES

Statutes | Page

II

STATEMENT OF ISSUES

1. On appeal is plaintiff entitled to a trial de novo of the facts?

2. Were the District Court's Findings of Fact "clearly erroneous" where in each case they were supported at the trial by substantial oral testimony and documentary evidence?

3. Did the District Court abuse its discretion in denying a continuance to a party who was at all times represented by counsel and who was not prejudiced by the District Court's ruling?

III

NATURE OF THE CASE

This is an appeal from an action by a professional business broker for fees relating to two acquisitions by the Armstrong Cork Company ("Armstrong"), Thomasville Furniture Industries, Inc. ("Thomasville") and B. T. Babbitt, Inc. ("Babbitt"). The complaint consisted of four causes of action. In connection with the Thomasville acquisition, the only acquisition involved in this appeal, plaintiff alleged two causes of action for fees: a cause of action for $4,800,000 based upon a contract between plaintiff and defendant dated August 25, 1966 (the "Contract") (Exhibit A), and a common law cause of action in the amount of $4,800,000 for work, labor and service performed.

The action was instituted in 1969 in the Supreme Court of the State of New York, County of New York. On the basis of diversity of citizenship, the case was removed to the United States District Court for the Southern District of New York. The case was tried by the Court without a jury, Hon. Richard H. Levet presiding. In his Opinion, Findings of Fact and Conclusions of Law, dated December 21, 1973,

Judge Levet found that Armstrong was entitled to judgment dismissing plaintiff's claims in connection with Armstrong's acquisition of Thomasville. However, plaintiff was granted judgment in the amount of $3,140 plus interest in connection with Armstrong's acquisition of Babbitt. Accordingly, Judgment #74,048 was entered on January 10, 1974, and subsequently satisfied.

Plaintiff was represented by the firm of Shea, Gould, Climenko & Kramer, 330 Madison Avenue, New York, New York throughout the entire proceedings in District Court. Upon that firm's withdrawal from the case, plaintiff appeared as attorney of record pro se until July 19, 1974 at which time Freeman, Meade, Wasserman & Sharfman appeared on behalf of plaintiff.

On February 7, 1974, plaintiff filed a Notice of Appeal from that part of the District Court's Judgment dismissing plaintiff's claims for fees in connection with Armstrong's acquisition of Thomasville.

On July 16, 1974, Armstrong moved this Court, the Hon. Harrison L. Winter, the Hon. William H. Mulligan, Circuit Judges, and the Hon. Jon O. Newman, District Judge, presiding, for an order dismissing the appeal for plaintiff's failure to cause a timely transmission of the record on appeal and for his failure to file a bond for costs on

appeal. Plaintiff was subsequently ordered by this Court to file the record on appeal and a bond for costs on or before July 30, 1974.

Plaintiff transmitted the record on appeal on or about July 30, 1974, but erroneously included therein the complete depositions of Max Banzhaf and Frederick S. Donnelly, Jr., indexed as Documents Nos. 35 and 36, which were neither admitted into evidence at trial, nor before the District Court when the case was decided, nor even filed with the District Court until approximately ten months after trial.

At trial only small parts of the depositions of Mr. Banzhaf (p. 9, lines 6-9; p. 23, lines 2-19; p. 34, lines 20-23; and p. 60, lines 9-20) and Mr. Donnelly (p. 15, lines 17-25 and p. 16, lines 1-10) were read into the record by plaintiff's counsel for the purpose of cross-examination. Only these parts appear in the trial transcript (Banzhaf 277, 279-281, 285-288)* and (Donnelley 333-335) and no other parts of these depositions were offered or admitted into evidence in the District Court proceeding.

Consequently, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, the District Court, Hon. Richard H. Levet, presiding, on motion by Armstrong, duly

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* Names followed by numbers in parentheses indicate the witness and page number of the trial transcript.

struck from the record on appeal those parts of the depositions of Mr. Banzhaf and Mr. Donnelly which were neither offered nor admitted into evidence in that court (Appendix 711-712)

Accordingly, references in Plaintiff-Appellant's brief, pages 26 and 32, to the parts of the depositions of Messrs. Banzhaf and Donnelly which have been stricken from the record on appeal should be disregarded by this Court.

Plaintiff asks this Court to upset the findings of the court below which was confronted at trial with sharply conflicting* oral testimony from plaintiff on the one hand and from the President of Thomasville and the top executives of Armstrong on the other. Plaintiff now seeks to retry the case in this Court in total disregard of the "clearly erroneous" test and the well founded limitations of the power of this Court to retry the case de novo. We are compelled, therefore, to set forth the factual minutiae and chronological detail as they appear in the lifeless record and without this Court's having the opportunity to evaluate credibility and reliability of the various witnesses.

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*Many of the facts characterized as "undisputed" throughout plaintiff's brief (See, e.g., pages 4-10 and 47) were actually hotly contested at trial, as is readily apparent from the trial transcript.

A. ARMSTRONG'S WITNESSES

The President of Thomasville and four officers of Armstrong testified in person at the trial:

Thomas A. Finch, Jr. - President and Director of Thomasville at all relevant times. (At time of trial Mr. Finch was President of Thomasville and Senior Vice-President of Armstrong);

Maurice J. Warnock - President of Armstrong at all relevant times. (At time of trial Mr. Warnock was Chairman of Armstrong's Board of Directors);

James H. Binns - Senior Vice-President of Armstrong and Chairman of Armstrong's Acquisition Evaluation Committee at all relevant times. (At time of trial Mr. Binns was President of Armstrong);

Max Banzhaf - Staff Vice-President of Armstrong, a member of Armstrong's Acquisition Evaluation Committee, and chairman of its subcommittee to investigate acquisitions in the furniture industry at all relevant times. (At time of trial Mr. Banzhaf was Vice-President and Treasurer of Armstrong);

Frederick S. Donnelly, Jr. - Treasurer of Armstrong and member of Armstrong's Acquisition Evaluation Committee at all relevant times. (At time of trial Mr. Donnelly was Armstrong's Vice-President and General Manager, International Operations).

B. FACTUAL AND CHRONOLOGICAL SUMMARY

1. Plaintiff's First Meeting With Armstrong

Armstrong's officers and plaintiff first met on or about July 22, 1966 (Binns 416, 433-434 Warnock 374, 403, Samuels 31, Ex. 24*). At this meeting plaintiff was specifically told by Mr. Binns that Armstrong was already interested in and was already pursuing a possible merger with Thomasville, that Thomasville was excluded from any dealings with plaintiff, and that Armstrong would continue to pursue Thomasville independently of plaintiff. In addition, plaintiff was specifically instructed to stay away from Thomasville (Finding of Fact No. 12, Binns 418, 433, 434, Banzhaf 260, 290-291, Donnelly 324, 332, Warnock 377-378, 410).

2. The Contract

On August 25, 1966 plaintiff and Armstrong entered into a non-exclusive contract (the "Contract") (Findings of Fact Nos. 3, 4, 5, 6 and 7, Ex. A) which was drafted by plaintiff (Samuels 40, Binns 307, Donnelly 420, Ex. 11a;) and edited by Armstrong (Donnelly 306-307, Binns 420).

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* Refers to exhibits admitted into evidence or marked for identification at trial. Plaintiff's exhibits were marked numerically 1-24; Armstrong's exhibits were marked alphabetically A-L.

The Contract provided for the payment of a fee in certain situations, among others:

> "6. We (Armstrong) will pay you (plaintiff) as a fee a sum of money equal to three per cent (3%) of the total consideration paid by us for an acquisition found and negotiated and consummated by you on our behalf. In the event the said consideration shall be capital stock of our Company, the amount thereof for the purpose of computing your fee shall be based upon the closing price thereof on the New York Stock Exchange on the date of closing the transaction. Said fee shall be payable to you within fifteen (15) days after the closing. We reserve the option to arrange for the seller in any such transaction to pay your fee in accordance with this agreement." (Emphasis added)

Payment of a fee, any other compensation or expenses, by the defendant was specifically excluded and/or waived in certain situations, among others:

> "1. We (Armstrong) will not be liable for any disbursements or expenses of any kind or nature made or incurred by you (plaintiff) in your search for companies for possible acquisition by us, even though done as a result of a suggestion from us."

and

> "4. In the event you (plaintiff) submit a possible acquisition which has theretofore been considered by us (Armstrong), even though no negotiations with respect thereto had taken place, and irrespective of the source thereof (suppliers,

customers, bankers, employees, outside directors, other brokers or any other source), we will advise you promptly of that fact and, thereafter, you will refrain from working on our behalf on that deal. In any such case, if at any time we consummate a transaction with reference to a company so involved, we will have no obligation to you for a fee or other compensation or expense reimbursement." (Emphasis added)

Termination of the Contract was covered in Section 10:

"10. Either of us may terminate this Agreement at any time by giving the other at least thirty (30) days' written notice of intent to terminate. It goes without saying that we would not, in bad faith, exercise our right to terminate simply to avoid the payment of a fee to you in accordance with this agreement."

3. Armstrong's Contacts With Thomasville Prior To The First Meeting Between Armstrong And Plaintiff.

Autumn 1965 - Armstrong's First Meeting With Thomasville

Armstrong formed an Acquisition Evaluation Committee in September of 1965, almost a full year before the first meeting between Armstrong and plaintiff (Banzhaf 243, 366, 416). Mr. Binns was Chairman of the Acquisition Evaluation Committee, and Mr. Banzhaf was a member (Warnock 243, Binns 415). In September of 1965 Mr. Banzhaf was appointed head of a subcommittee of the Acquisition

Evaluation Committee to investigate possible acquisitions in the furniture industry (Finding of Fact No. 10, Donnelly 303, Binns 416).

As head of Armstrong's furniture acquisition subcommittee, Mr. Banzhaf and another member of the Acquisition Evaluation Committee met with officers of Thomasville on November 23, 1965 at the Thomasville plant in Thomasville, North Carolina (Banzhaf 247, 276). This meeting was held approximately eight months prior to plaintiff's first contact with Armstrong in the summer of 1966 (Samuels 31).

January 1966 - Armstrong's Second Meeting With Thomasville

On or about January 21, 1966, Mr. Banzhaf and other members of Armstrong's Acquisition Evaluation Committee met a second time with Thomasville officers, including Mr. Finch, president of Thomasville, and discussed with Mr. Finch Armstrong's possible entry into the furniture industry as a "supplier" or "partner" to Thomasville. (Banzhaf 247, 248, 278, Finch 184, 185, Finding of Fact No. 10).

This meeting was held approximately six months before plaintiff's first meeting with Armstrong in the summer of 1966 (Samuels 31, Banzhaf 247).

Prior to July 1966 - Armstrong Collected Data On Thomasville With A View Toward Possible Acquisition

Prior to plaintiff's first contact with Armstrong in the summer of 1966, Armstrong was considering Thomasville for possible acquisition and made studies and collected data on Thomasville. (Finding of Fact No. 11, Banzhaf 242-246, Warnock 365-374, Binns 418, Exs. I, J, K, and L).

4. Events During The Term Of The Contract (August 25, 1966 - February 10, 1967)

At no time did plaintiff submit, either orally or in writing, the name of Thomasville to Armstrong (Finding of Fact No. 25, Banzhaf 286, Donnelly 322a, 348, 362, Binns 433, Warnock 377-378, 381, Samuels 109, Ex. D.).

Plaintiff admitted that the name Thomasville is nowhere identified as his submission or is even mentioned in any of his letters of referral or in any other document (Samuels 109). This admission is particularly significant since it was plaintiff's customary practice to protect his interests by identifying in writing, as his submission, the numerous companies he presented to Armstrong. Indeed, during the term of the Contract plaintiff wrote some fifteen letters of referral to Armstrong in which he listed by name over fifty different companies (Finding of Fact No. 25, Donnelly 322, 322a, Ex. D).

Moreover, plaintiff also admitted never having arranged a single meeting between Armstrong and Thomasville or even having made one introduction (Findings of Fact Nos. 10, 13, 15, 20, 22, 23 and 24, Samuels 114, 144-146).

There were three meetings between the officers of Armstrong and Thomasville: November 1965, January 1966, October 1966, all of which occurred before plaintiff claimed he made any contact at all with Thomasville (Findings of Fact Nos. 10 and 13, Samuels 78-79).

Throughout the term of the Contract, Armstrong continually kept Thomasville separate from and independent of the possible acquisitions submitted by plaintiff. Indeed, Armstrong never requested or authorized plaintiff to use its name, to arrange any meeting, to approach, or to initiate any discussions with Thomasville (Finding of Fact No. 26, Banzhaf 256, 260, 292, Donnelly 316-318, 323-324, 329, 332, 364, Warnock 377-378, 410, Binns 418, 433, 434).

In fact, at plaintiff's first meeting with Armstrong in the summer of 1966, he was unequivocally told that Armstrong was already actively considering Thomasville as an acquisition, that it would continue to pursue Thomasville independently and that Thomasville was not to be a part of any future contract with plaintiff

Significantly, this advice is plaintiff's only written reference to Mr. Finch (Samuels 109, Donnelly 338, 362-363). Concededly, the name "Thomasville" does not appear in any written communication between plaintiff and Armstrong (Samuels 109-110).

October 18, 1966 - Armstrong's Third Meeting With Thomasville

Despite plaintiff's attempt to discourage Armstrong's interest in Thomasville, on October 18, 1966, Mr. Banzhaf, Mr. Donnelly and another Armstrong officer met as planned with Mr. Finch, President of Thomasville, at the Wachovia Bank in Winston-Salem, North Carolina (Finch 185, 187, Banzhaf 251, Donnelly 320). This meeting was arranged by Armstrong directly with Thomasville through Mr. Watlington, not an outsider, as argued by plaintiff, but a director of Thomasville and an officer of the Wachovia Bank and Trust Company, at whose offices the meeting took place (Donnelly 341, Banzhaf 264, Finch 185-186). The plaintiff did not suggest, arrange or attend this meeting (Finding of Fact No. 15, Samuels 113-114, Finch 185-186, Banzhaf 251-252, Donnelly 327, 341).

At the meeting, Mr. Banzhaf, who personally knew Mr. Finch from having previously discussed Armstrong's

entry into the furniture industry for "two or three hours" in January of 1966, directly proposed the merger of Armstrong and Thomasville to Mr. Finch (Finch 187-188, Banzhaf 252-253, Donnelly 320-321, 341, Binns 433). In response, Mr. Finch agreed to consider the proposal (Finding of Fact No. 15, Banzhaf 253, Donnelly 321, Finch 188).

Late December 1966 - Plaintiff's First Alleged Contact With Mr. Finch

Although plaintiff insisted that Armstrong had been continuously "bugging" him since August, 1966 to pursue Thomasville (Samuels 116-118), plaintiff claimed his first contact with Mr. Finch was in late December, 1966 when plaintiff allegedly called him to arrange a meeting together while both would be in Chicago attending the January furniture mart (Samuels 78-79). Mr. Finch denied ever receiving such a call (Finch 209). Such a call was contrary to plaintiff's testimony at his pre-trial deposition given under oath some four years before the trial (Samuels 81-87). Plaintiff had no record of such a call (Samuels 118-120). The District Court, therefore, found that no such call had in fact been made (Finding of Fact No. 14).

January 4, 5, and 6 1967 - Armstrong's Fourth Meeting With Thomasville

At Armstrong's invitation, on January 4, 5 and 6, 1967, Thomasville's officers, including Mr. Finch, met with Armstrong officers at the Armstrong plant in Lancaster, Pennsylvania (Finch 189, Banzhaf 258-259, Donnelly 321, Warnock 383, Binns 421-422; Ex. F). Merger between Armstrong and Thomasville was again proposed and discussed at length throughout this 3 day meeting (Finch 191-192, Banzhaf 265-266, Donnelly 321, Warnock 384-387, Binns 422-424). Plaintiff did not suggest, arrange or attend this meeting (Finding of Fact No. 15, Samuels 114, Finch 189-190, 205, Banzhaf 260-262, Warnock 385, Binns 433).

Early January 1967 - Plaintiff's Performance Was Reviewed And Notice Of Termination Was Sent

In early January, 1967, Messrs. Warnock, Binns and Banzhaf met and reviewed plaintiff's work with Armstrong during 1966. They concluded that Armstrong was "not getting any place" and that Armstrong, in all fairness to plaintiff and itself, should terminate its relationship with plaintiff (Finding of Fact No. 16, Warnock 413, 414). Accordingly, notice of termination was given by Armstrong on January 11, 1967 (Ex. 14).

Mid-January, 1967 - Plaintiff Contacted Mr. Finch

Realizing that Armstrong would not permit him to intervene in the negotiations with Thomasville, plaintiff decided, without Armstrong's authorization or approval, to approach Mr. Finch, suggest that he was representing Armstrong, and attempt to get Thomasville to start negotiating through him.

Plaintiff approached Mr. Finch at the mid-January, 1967 Chicago furniture mart (Samuels 59-61, Finch 192-193). Admittedly, plaintiff was told by Mr. Finch that Thomasville was not interested in plaintiff's proposal regarding affiliation with Armstrong (Finding of Fact No. 17, Samuels 60, 93, Finch 192-193). Moreover, notice of termination of the Contract had been sent to plaintiff prior to this time (Donnelly 325-326, 343-344, Warnock 412-414).

Mid-January, 1967 - Plaintiff Was Instructed For the Second Time To Stay Away From Thomasville

Plaintiff was informed during mid-January, 1967, for a second time, that Armstrong was pursuing Thomasville independently, and plaintiff was instructed by Mr. Donnelly to stay away from Thomasville (Finding of Fact No. 18, Banzhaf 260, 292, Donnelly 324, 342-343).

February 10, 1967 - Contract Is Terminated

Plaintiff's Contract with Armstrong terminated on

or about February 10, 1967 upon the expiration of 30 days' written notice given by Armstrong on January 11, 1967 (Finding of Fact No. 16, Ex. 14).

5. Events After Termination of the Contract

March 1967 - Plaintiff's Fourth Alleged Contact With Thomasville

Plaintiff claimed he placed a telephone call to Mr. Finch in March, 1967, at which time plaintiff claimed Mr. Finch consented to attend a meeting with Armstrong (Samuels 68-69). Mr. Finch denied ever receiving such a call (Finch 207-209). The District Court found that no such call occurred (Finding of Fact No. 19).

April and August 1967 - Armstrong Again Met With Thomasville

On April 27, 1967 and August 24 and 25, 1967 affiliation between Armstrong and Thomasville was again discussed by officers of the two companies. Plaintiff did not suggest, arrange or attend these meetings (Finding of Fact No. 20, Finch 195-196, 210-214, Warnock 392-395, Binns 426-428, Banzhaf 262-266, Ex. [illegible])

November, 1967 - Discussions Terminated

On or about November 10, 1967, Thomasville's

directors decided not to affiliate with Armstrong. Mr. Finch informed Mr. Binns of this decision (Finding of Fact No. 21, Finch 214, Binns 429).

February, 1968 - Discussions Resumed

Thomasville resumed merger discussions with Armstrong in mid-February, 1968 (Finch 215-216, Banzhaf 266-268). Plaintiff played no part in the resumption of discussions (Binns 433). From mid-February, 1968 until the end of June, 1968, officials of Armstrong and Thomasville met several times and discussed affiliation (Finch 215-220, Banzhaf 266-275, Warnock 397-402, Binns 429-431). Plaintiff did not suggest, arrange or attend any of these meetings (Finding of Fact No. 22, Binns 433).

July 2, 1968 - Informal Agreement Reached

On or about July 2, 1968, officers of Armstrong met with officers of Thomasville and an informal affiliation agreement was reached (Ex. H; Finch 173, 220-222, Banzhaf 275, Warnock 402). Plaintiff did not suggest, arrange or attend this meeting (Finding of Fact No. 23, Binns 433).

November 1, 1968 - Merger Agreement Formalized

On or about November 1, 1968, the formal affiliation agreement between Armstrong and Thomasville was consummated (Finch 173, 222-223, Warnock 402). In accordance with this agreement Armstrong paid a total of $149,962,984 for Thomasville (Exs. 1, 2 and 3; 456-458). Plaintiff did not attend the closing or negotiate any of the terms of this Agreement (Finding of Fact No. 24, Samuels 89-90).

IV

ARGUMENT

POINT 1

THE DISTRICT COURT'S FINDINGS OF FACT SHOULD NOT BE REVERSED SINCE THEY WERE BASED ON SUBSTANTIAL CREDIBLE TESTIMONY

A. Standard Of Review

It is well settled that on appeal an appellant is not entitled to a trial "de novo" of the facts. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949); United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945); West v. Schwartz, 182 F.2d 721, 722 (7th Cir.), cert. denied, 340 U.S. 830 (1950); Anderson v. Federal Cartridge Corp., 156 F.2d 681, 684 (8th Cir. 1946).

As set forth in Rule 52 of the Federal Rules of Civil Procedure:

> "FINDINGS BY THE COURT
>
> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

a District Court's findings of fact should not be reversed by an appellate court unless "clearly erroneous." United States v. Oregon State Medical Society, 343 U.S. 326, 332 (1952); United States v. Yellow Cab Co, 338 U.S. 338, 341-342 (1949).

The "burden" is on the appellant to prove that the district court's findings of fact are clearly erroneous. Hedger v. Reynolds, 216 F.2d 202, 203 (2d Cir. 1954); Seaton v. Sills, 403 F.2d 710, 711 (5th Cir. 1968); St. Louis Typographical Union No. 8 v. Herald Co., 402 F.2d 553, 557 (8th Cir. 1968); Smith v. James Irving Foundation, 402 F.2d 772, 774 (9th Cir. 1968), cert. denied, 394 U.S. 1000 (1969). Moreover, the appellate court must "look only to the evidence most favorable to the District Court's findings and such reasonable inferences as may be drawn from such evidence." Lewis Mach. Co. v.

Aztec Lines, Inc., 172 F.2d 746, 748 (7th Cir. 1949). Accord, Anderson v. Federal Cartridge Corp., 156 F.2d 681, 684 (8th Cir. 1946); Joseph v. Donover Co., 261 F.2d 812, 817, 818 (9th Cir. 1959).

The appellate court "may not substitute [its] judgment for that of the trier of facts in absence of clear error." United States v. Jones Beach State Parkway Authority, 255 F.2d 329 (2d Cir. 1958). Likewise, as the Supreme Court stated:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. ... We are not given those choices, because our mandate is not to set aside findings of fact unless clearly erroneous."

United States v. National Assoc. R.E.B., 339 U.S. 485, 495-496 (1949). "[A] choice between two permissible views of the weight of the evidence is not 'clearly erroneous'." United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949).

The district court's findings of fact must be affirmed "unless they cannot be sustained on any rational view of the evidence." Shapiro v. Rubens, 166 F.2d 659 (7th Cir. 1948). In other words, "[i]f there is any

substantial evidence to support these findings," the district court's decision must be affirmed. Lewis Mach. Co. v. Aztec Lines, Inc., 172 F.2d 746, 748 (7th Cir. 1949). Accord, Alabama Power Co. v. Ickes, 302 U.S. 464, 477 (1938).

Plaintiff contends on appeal that the District Court's Findings of Fact were taken directly from Armstrong's proposed findings and that, therefore, some lesser standard of review should be applied. This contention is without merit.

First, the District Court's Findings of Fact clearly reflect independent analysis and writing by the District Judge. Several weeks prior to the District Court's decision, both parties submitted proposed findings of fact and conclusions of law. The District Court completely rejected Armstrong's proposed findings relative to the Babbitt acquisition, and its Findings of Fact relative to the Thomasville acquisition were obviously not adopted verbatim from Armstrong's proposed findings. Indeed, the plaintiff does not make such a contention. In addition to different wording, the organization of the District Court's Findings is distinctive from Armstrong's proposed findings. An important example is the District Court's chronological treatment of the central issue in this action - plaintiff's

contacts with Thomasville (Findings Nos. 14, 17 and 19) in relation to Armstrong's contacts with Thomasville. No such chronological format is contained in Armstrong's proposed findings. Moreover, apart from his Findings of Fact, the District Judge even wrote a "Discussion" outlining the main reasons why plaintiff's testimony was rejected (Opinion 12, 13). There is no reason to doubt, therefore, that the District Judge "has carefully examined the proof submitted and after extensive consideration has decided the issues" (Opinion 2).

Second, it is well settled that:

> "[A]ll findings of fact and conclusions of law upon which a district court bases its actions are to be reviewed on an identical standard regardless of whether such findings are court-originated or party-suggested. That standard is: Are such findings clearly erroneous?"

Eli Lilly and Co. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1099 (5th Cir. 1972). This is true even if a district court were to adopt "verbatim" all of a litigant's proposed findings:

> "[Such verbatim] findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence."

United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 (1964). Accord, United States v. Crescent Amusement Co.,

323 U.S. 173, 185 (1944); Rooted Hair, Inc. v. Ideal Toy Corp., 329 F.2d 761, 763 (2d Cir. 1964).

B. Findings of Fact Based On Oral Testimony Are "Unassailable"

The District Court's Findings of Fact should not be set aside "unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Rule 52(a), Fed. R. Civ. P. (Emphasis added).

Where the findings of fact of a judge who saw the witnesses "depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable." (Emphasis added). Davis v. Schwartz, 155 U.S. 631, 636 (1895); Adamson v. Gilliland, 242 U.S. 350, 353 (1916); Alabama Power Co. v. Ickes, 302 U.S. 464, 477 (1938); United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945).

The policy behind this rule has been explained by the Supreme Court:

> "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases

> the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' Boyd v. Boyd, 252 N.Y. 422, 429, 169 N.E. 632, 634."

United States v. Oregon State Medical Society, 343 U.S. 326, 339 (1951); Accord, United States v. Yellow Cab Co., 338 U.S. 338, 341-342 (1949).

C. The District Court's Findings Of Fact Are All Supported By Substantial Evidence

On this appeal plaintiff is asking this Court for what amounts to a trial de novo of the facts found below by the trial court.

In seeking to have set aside the District Court's Findings of Fact Nos. 10, 11, 12, 16, 25 and 26, plaintiff is asking this Court to reverse findings which are all supported by substantial evidence, most of which was the oral testimony of witnesses who appeared before the trial judge and whose credibilty he alone was in a position to measure.

An examination of the District Court's Findings of Fact that are attacked here by plaintiff, and of the substantial evidence which supports them, demonstrates

clearly and conclusively that the trial judge did not err and that the decision below must be affirmed in all respects.

Finding of Fact No. 10

> "10. Members of Armstrong's Acquisition Evaluation Committee met with officers of Thomasville on two separate occasions prior to Armstrong's first contact with Samuels on July 22, 1966. (See Finding 12)
>
> "(a) The first meeting between Armstrong and Thomasville took place on or about November 23, 1965, when officers of both companies, including Banzhaf of Armstrong, met at the Thomasville plant in Thomasville, North Carolina. (247)
>
> "(b) The second meeting between officers of Armstrong (including Banzhaf) and Thomasville (including Finch) was on or about January 21, 1966. The discussion at this meeting centered around Armstrong's possible entry into the furniture industry as a supplier or manufacturer, through either acquisition or internal expansion. (247-248, 278)."

Finding of Fact No. 10 is clearly supported by the substantial testimony of witnesses who appeared at trial, and was in fact uncontested by plaintiff at trial.

Mr. Banzhaf testified at trial that as a member of Armstrong's Acquisition Evaluation Committee and Chairman of the subcommittee to evaluate acquisitions in the furniture industry (Banzhaf 243, Binns 416), he and other members of Armstrong's Acquisition Evaluation Committee first met with the officers of Thomasville on November 23, 1966 (Banzhaf 247, 248). At the meeting on January

21, 1966, Mr. Banzhaf met with Mr. Finch, President of Thomasville, and discussed some of the "technical capacities that Armstrong thought [it] had that [it] could bring to the furniture business and thus improve some of the problems" (Banzhaf 247, 248). He told Mr. Finch that Armstrong was interested in entering the furniture industry as "a supplier", or "a partner" (Banzhaf 247).

Mr. Finch's testimony at trial also supports Finding No. 10. Mr. Finch testified that he personally met with Mr. Banzhaf and two other Armstrong officers on January 21, 1966 (Finch 183). At that meeting, "Mr. Banzhaf mentioned that Armstrong was considering entering the furniture business." (Finch 184, 185).

Their meeting lasted "two to three hours" and Mr. Banzhaf and Mr. Finch came to be on friendly and personal terms (Finch 185). Indeed, as things were left, Armstrong would "continue to look at and be in touch with" Thomasville (Finch 185).

At trial there was no contrary testimony or other evidence presented by plaintiff.

Finding of Fact No. 11

> "11. Prior to Armstrong's first meeting with Samuels on July 22, 1966 (see Finding 12), Armstrong had collected and considered data on several furniture companies, including Thomasville, with a view toward possible acquisition. (365-374; Exs. I, J, K, L)"

The District Court's Finding of Fact No. 11 is supported by substantial evidence, including both the oral testimony of witnesses at trial and documentary evidence.

Mr. Banzhaf testified at trial that prior to his meeting plaintiff on August 25, 1966 he had conducted studies on Thomasville in his capacity as a member of Armstrong's Acquisition Evaluation Committee (Banzhaf 243-247).

Finding No. 11 is also supported by documentary evidence in the form of Exhibits I, J, K and L. On this appeal plaintiff contends that the trial court erred in admitting three of the four exhibits, Exhibits I, J and L, into evidence under the Federal Business Records Statute, 28 U.S.C. § 1732(a), a portion of which plaintiff has set out in his brief at page 23. Plaintiff fails, however, to set out the second paragraph of the statute which is clearly central to deciding the question of admissibility:

> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

Mr. Warnock, President of Armstrong at the time Exhibits I, J and L were prepared, answered "Yes" when asked on direct examination if the documents were

"prepared in the regular course of business of Armstrong Cork Company in connection with its acquisition program." (Warnock 370).

Plaintiff stresses that Mr. Warnock did not prepare the records himself and could not "swear they came from the Armstrong files." However, it is well settled that it is not necessary under the statute that the witness laying the foundation for the documents either be the person who prepared them or state that they have come from the company's files. United States v. Dawson, 400 F.2d 194, 198-199 (2d Cir. 1968), cert. denied, 393 U.S. 1023 (1969).

The one case cited by plaintiff in support of his position, United States v. Rosenstein, 474 F.2d 705 (2d Cir. 1973) is inapposite since the court there found that the person offering the documents was not "someone who is sufficiently familiar with the business practice." 474 F.2d at 710. Mr. Warnock, President of Armstrong, was obviously familiar with the company's business practice and was clearly competent to testify that the exhibits in question were prepared in the regular course of that business.

Finding of Fact No. 12

> "12. On or about July 22, 1966, plaintiff and Armstrong had their first contact. (Ex. 24) At this meeting, Binns specifically

> told plaintiff not to approach Thomasville since Armstrong was already interested in that company as a possible acquisition and would follow through on that matter itself. (324, 332, 377-378, 410, 418, 433-434)"

The date "On or about July 22, 1966" is supported both by Mr. Binns' testimony (Binns 416) and Mr. Binns' expense voucher (Ex. 24) which indicated that Mr. Binns, Mr. Warnock and Mr. Donnelly met and had lunch with plaintiff on July 22, 1966. In the face of such documentary evidence, plaintiff's vague testimony that his first contact with Armstrong was "on or about August 10, 1966" was rejected by the District Court (Samuels 31). On appeal, plaintiff now cites Exhibits 22 and 23. However, Exhibits 22 and 23 were not admitted into evidence, were not before the District Court and, therefore, should not be considered by this Court on appeal.

It should be noted that whether plaintiff's first meeting with Armstrong took place on July 22, 1966 or on August 10, 1966 is immaterial. Neither party claims having taken any action with respect to Thomasville during the period between these two dates.

The second sentence of Finding No. 12 is exclusively predicated on the District Court's evaluation of conflicting oral testimony given at trial.

The District Court accepted Mr. Binns' testimony that, at his first meeting with Mr. Samuels, he informed plaintiff that Armstrong was already considering Thomasville, that Armstrong would continue to pursue Thomasville independently, and that plaintiff was to stay away from Thomasville. (Binns 418, 433-434).

The finding is further supported by testimony to the same effect from Mr. Warnock (Warnock 377-378, 391, 410), Mr. Banzhaf (Banzhaf 260, 290-291) and Mr. Donnelly (Donnelly 324-332). It is also buttressed by the fact that members of Armstrong's Acquisition Evaluation Committee had met with officers of Thomasville, including Thomasville's president Mr. Finch, and had been collecting data on Thomasville many months prior to plaintiff's first contact with Armstrong. (Finding of Fact Nos. 10 and 11, Banzhaf 247-248, 278, Warnock 365-374, Exs. I, J, K, and L).

In contrast, the District Court rejected plaintiff's claim that such a conversation did not take place. However, plaintiff does admit that he met Mr. Binns, Mr. Warnock, Mr. Donnelly and certain other Armstrong officers at his first meeting with Armstrong (Samuels 32-33). But, plaintiff's account of the conversation was totally incredible and was rejected as such by the trial court (Finding of Fact No. 12). First, plaintiff stated he

"never discussed Thomasville with Mr. Binns" (Samuels 97-98). Then, reversing his position, plaintiff stated that he mentioned the name Thomasville at this meeting and "Mr. Binns didn't react to it at all" (Samuels 98). Later, in another complete reversal, plaintiff testified that when he suggested at this meeting that Thomasville be considered as a possible acquisition "Mr. Binns was delighted" and that Mr. Binns and the other Armstrong officers were all "delighted with the deals [he] was discussing with them" (Samuels 98-100).

Plaintiff's testimony was also contradicted by documentary evidence. In Exhibit 13, admittedly plaintiff's only written reference to Mr. Finch (plaintiff never put the name "Thomasville" in writing), he discouraged Armstrong from pursuing Thomasville and instead encouraged Armstrong to purchase Johnson-Carper, one of the companies he had submitted (Samuels 122-123, Donnelly 317-318, Banzhaf 286, Ex. D).

Plaintiff's testimony was further undercut by his own behavior. Plaintiff, who admitted that he had to move quickly in his business as a broker (Samuels 117), concededly made no contact with Thomasville or Mr. Finch until late December, 1966, several months after his first meeting with Armstrong in the summer of 1966.

Moreover, plaintiff's attempt to support his position by pointing to the absence of an express exclusion

of Thomasville in the Contract was found to be without merit and was rejected by the trial judge. Section 4 of the Contract specifically excluded the payment of any fees, expenses or other compensation where plaintiff submitted a possible acquisition which previously had "been considered by Armstrong, even though no negotiations with respect thereto had taken place, and irrespective of the source thereof (suppliers, customers, bankers, employees, outside directors, other brokers or any other source)" (Ex. A, Finding of Fact No. 6). As Mr. Warnock testified at trial, Armstrong did not want to enter into a "global" contract with plaintiff, and accordingly refused to list in the Contract the names of any of the companies already agreed upon as being excluded, including Thomasville, because doing so might imply that these would be the only companies excluded (Warnock 376-379, 404-405).

Finding of Fact No. 16

> "16. Plaintiff's agreement with Armstrong was terminated in good faith on or about February 10, 1967 upon the expiration of thirty days following written notice given by Armstrong dated January 11, 1967. (412-414; Ex. 14)"

This finding is supported by the direct testimony of both Mr. Donnelly and Mr. Warnock. Both testified that notice of the termination of the Contract contained in Ex. 14, dated January 11, 1967, was given to plaintiff

before Armstrong became aware of plaintiff's intervention with Mr. Finch in violation of Armstrong's instructions (Finding of Fact No. 12), and that termination did not result from this violation of instructions (Donnelly 325-326, 343-345, Warnock 412-414). Rather, in early January, 1967, when Armstrong "reviewed Samuels work" during 1966, it was "concluded that we were not getting any place, and that we, in fairness to him and ourselves, should terminate the relationship" (Warnock 413).

Finding of Fact 25

> "25. During the term of the contract, from August 25, 1966 until February 10, 1967, plaintiff submitted many companies for Armstrong to consider as acquisitions. (108-109; Ex. D) Thomasville was not one of the companies submitted by plaintiff." (332a, 348, 433; Ex. D).

Finding No. 25 is also based on the District Court's evaluation of the credibility of witnesses who testified at the trial. It is directly supported by the testimony of Mr. Donnelly that "Thomasville was not proposed by Mr. Samuels" (Donnelly 322a, 348, 362) and also by the testimony of Mr. Binns (Binns 433), Mr. Banzhaf (Banzhaf 286), and Mr. Warnock (Warnock 377-378, 381).

Finding No. 25 is also supported by the plaintiff's own admission. When asked whether he submitted "the name Thomasville in any communication to Armstrong," plaintiff answered "No, I did not" (Samuels 109, 110).

Documentary evidence also supports the District Court's Finding. Exhibit D, a group of letters sent by plaintiff to Armstrong and containing the names of over 50 companies submitted by plaintiff for possible acquisition, does not contain any suggestion, proposal or even the name "Thomasville." Moreover, Exhibit 13 demonstrates that, contrary to plaintiff's testimony, plaintiff actually discouraged Armstrong from meeting with Mr. Finch. In the same letter, plaintiff recommended merger with Johnson-Carper, a company plaintiff had submitted to Armstrong, and for which plaintiff would be entitled to a substantial fee if a merger were consummated.

Finding of Fact No. 26

> "26. Armstrong never asked Samuels to take any part whatsoever in furtherance of Armstrong's pursuit of Thomasville (260, 292, 323-324, 332, 342-343, 377-378, 410, 418 434) nor did any of its officers request plaintiff to find out if Finch was interested in affiliation with Armstrong. Plaintiff's testimony to the contrary is rejected. (48, 51-52, 58, 68)"

Finding of Fact No. 26 is exclusively based on the District Court's evaluation of the credibility of witnesses who testified at trial.

In direct support of the District Court's Finding, four witnesses, Mr. Banzhaf, Mr. Donnelly, Mr. Warnock and Mr. Binns, testified that plaintiff was never request-

ed to intervene, participate, or take any action whatsoever in furtherance of Armstrong's pursuit of Thomasville (Banzhaf 256-260, 292, Donnelly 316-318, 323-324, 329, 332, 364, Warnock 377-378, 410, Binns 418, 433, 434).

Against the weight of this testimony, plaintiff's testimony that he was repeatedly "bugged" by Donnelly to find out if Finch was interested in merging with Armstrong (Samuels 48, 51-52, 56, 68) was rejected by the District Court.

Moreover, as the District Court pointed out, plaintiff's own behavior made his testimony incredible (Opinion 12, 13). Plaintiff's response to these alleged requests was wholly inconsistent with his method of conducting business, since as plaintiff himself testified, he "moved in a hurry" in his business (Samuels 117). Yet despite these alleged "urgings" (Samuels 117) by Donnelly starting in August, 1966, plaintiff claimed that several months later he made two telephone calls, late December, 1966 and March, 1967, four months apart, and attempted to see Mr. Finch twice at trade shows in Chicago during January and June of 1967. Such a diffident response belied plaintiff's claim that he was reacting to repeated "bugging" from Donnelly from August of 1966 through June of 1967 (Samuels 117-118),

and indicated that the alleged requests by Donnelly were in fact never made.

Furthermore, as the District Court correctly recognized (Opinion 12), taken in the context of the direct relationship that developed between Armstrong's officers on the one hand and Thomasville and Mr. Finch on the other, plaintiff's testimony that he, an outside party, was urged by Mr. Donnelly from August, 1966 through June, 1967 to intercede with Mr. Finch was incredible.

Even prior to plaintiff's first contact with Armstrong in the summer of 1966, Mr. Banzhaf, a member of Armstrong's Acquisition Evaluation Committee and chairman of the subcommittee to evaluate possible acquisitions in the furniture industry, along with other Armstrong officers, met with Thomasville officers in November, 1965 and January, 1966 (Banzhaf 247-248, 276). At the January, 1966 meeting, Mr. Banzhaf met directly with Mr. Finch and informed him that Armstrong was interested in entering the furniture industry, possibly as a "partner" to Thomasville (Banzhaf 247, Finch 183, 184, 185). Their meeting lasted "two or three hours" and Mr. Banzhaf and Mr. Finch came to be on friendly and personal terms (Finch 185). The result of the meet-

ing was that Armstrong would "continue to look at and be in touch with" Mr. Finch (Finch 185, Banzhaf 253, Donnelly 321).

This direct relationship between Armstrong and Thomasville developed further on October 18, 1966, when Mr. Banzhaf, Mr. Donnelly and another Armstrong officer met with Mr. Finch (Finch 185, 187, Banzhaf 251, Donnelly 320). Mr. Banzhaf, who personally knew Mr. Finch from having previously discussed Armstrong's entry into the furniture industry for "two or three hours" with him in January of 1966, directly proposed affiliation between the two companies (Finch 187-188, Banzhaf 252-253, Donnelly 320-321, Binns 433). Mr. Finch agreed to consider the proposal (Finch 188). This meeting was arranged by Armstrong directly with Thomasville by Mr. Watlington, not an outsider as argued by plaintiff, but a director of Thomasville and an officer of the Wachovia Bank and Trust Company, at whose offices the meeting took place (Banzhaf 264, Donnelly 341, Finch 185-186). The plaintiff did not suggest, arrange or attend this meeting (Samuels 113-115; Finch 185-186, Banzhaf 251-252, Donnelly 327).

Armstrong's direct relationship with Thomasville developed still further on January 4, 5 and 6, 1967, when Thomasville's officers, including Mr. Finch, met with Armstrong's top management at the Armstrong plant in

Lancaster, Pennsylvania (Finch 189, Banzhaf 258-259, Donnelly 321, Warnock 383, Binns 421-422; Ex. F). Again, merger was proposed and discussed (Finch 191-192, Banzhaf 265-266, Donnelly 321, Warnock 384-387, Binns 422-424). Plaintiff did not suggest, arrange or attend this meeting; Armstrong arranged this meeting directly with Thomasville (Samuels 114, Finch 189-190, 205, Banzhaf 260-262, Warnock 385, Binns 433).

Plaintiff's testimony, therefore, that he was requested by Mr. Donnelly from August 1, 1966 through June, 1967 to intervene with Thomasville was rejected by the District Court since it was contradicted by the direct oral testimony of Armstrong's officers and by an overwhelming mass of other evidence to the contrary, including (1) the numerous direct contacts occurring between Mr. Finch and Mr. Donnelly, Mr. Banzhaf and other Armstrong officers during this period; (2) the direct relationship that developed during this period between Armstrong's officers and Thomasville and Mr. Finch; (3) plaintiff's diffident behavior in pursuing Thomasville during this period in sharp contrast to his admission that he always "moved in a hurry" to earn a fee from Armstrong (Samuels 117-118); (4) the improbability of such requests by Mr. Donnelly in light of Mr. Donnelly's knowledge of his

superior's instructions given to plaintiff at plaintiff's first meeting with Armstrong that he was to stay away from Thomasville (Donnelly 324, 332); and (5) Mr. Finch's insistence with Armstrong management that their discussions be kept in the strictest confidence (Finch 194, 225-226, Warnock 389-390).

In addition, as the District Court noted both in its Findings of Fact and several times during the trial, plaintiff's credibility was open to serious question in view of the radically different testimony that he gave at trial regarding the central issue of this action - the dates and results of plaintiff's alleged contacts with Thomasville (Finding of Fact No. 14, Samuels 81-87, 130-133) - and in view of plaintiff's general evasiveness in answering questions (Samuels 13, 64-65, 77, 85, 94, 105, 109-110, 114, 129-130).

POINT 2

THE DISTRICT COURT'S CONCLUSIONS OF LAW WERE CORRECT

Plaintiff was not entitled to any compensation under the Contract because the Thomasville acquisition was not "found and negotiated and consummated" by plaintiff as required by the Contract (Ex. A, Section 6).

The District Court specifically found that "Thomasville was not one of the companies submitted by plaintiff" (Finding of Fact No. 25). Moreover, finding requires something more than the mere suggesting of a name. Towers v. Dorowshaw, 5 Misc.2d 241,249, 159 N.Y.S.2d 367 (Sup. Ct. 1957). Even the two cases cited by plaintiff, Simon v. Electrospace Corp., 32 App. Div. 2d 62, 299 N.Y.S.2d 712 (1st Dept. 1969), modified, 28 N.Y.2d 136,269 N.E.2d 21, 320 N.Y.S.2d 225 (1971) and Seckendorff v. Halsey, Stuart & Co., Inc., 234 App. Div. 61,254 N.Y.S. 250 (1st Dept. 1931), rev'd on other grounds, 259 N.Y. 353,182 N.E. 14 (1932), involve factual situations where there had been no prior contact between the parties to the transaction, the finders produced parties ready and willing to perform, the finders introduced the parties to the transaction* and arranged and attended one or more meetings between the parties.

Such are not the facts of the case at bar. It is undisputed that Armstrong and Thomasville had several contacts prior to plaintiff's first meeting with Armstrong and that plaintiff did not introduce

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* In Simon, the contract required only an introduction.

any officers of Armstrong to any officers of Thomasville (Samuels 144-146) or arrange or attend any meetings between the two companies (Findings of Fact Nos. 10, 13, 15, 20, 22, 23 and 24, Samuels 114, Finch 185-186, Banzhaf 252, 261-262, Warnock 392-393, Binns 433). Significantly, plaintiff never produced a company that was ready, willing and able to perform. At no time was plaintiff told by Mr. Finch that Thomasville was available for acquisition (Samuels 91-94, Finch 193, 209, 227, 230-234). At no time did plaintiff secure the consent of Thomasville to any proposed merger or affiliation with Armstrong (Samuels 64-65). On the contrary, plaintiff admitted that Mr. Finch was not interested in plaintiff's proposal regarding affiliation with Armstrong (Finding of Fact No. 17, Samuels 60, 93, Finch 193).

Clearly then, plaintiff was not the "procuring cause of the transaction;" plaintiff did not bring the parties together or produce a company which was ready and willing to perform. Sibbald v. The Bethlehem Iron Company, 83 N.Y. 378, 383 (1881); Duane v. Polk, 32 N.Y.S.2d 568, 572 (Sup. Ct. 1941), aff'd, 264 App. Div. 753, 35 N.Y.S.2d 267 (1st Dept. 1942).

Furthermore, plaintiff was not present during any of the negotiations and did not attend the closing as required by the Contract (Finding of Fact No. 24, Samuels 89-90).

Section 4 of the Contract also precludes any recovery by plaintiff because as the District Court found, prior to plaintiff's first contact with Armstrong in the summer of 1966, Armstrong had already met with and was considering Thomasville as a possible acquisition (Findings of Fact Nos. 10 and 11). Armstrong informed plaintiff of this fact at their first meeting (Finding of Fact No. 12). Thereafter, plaintiff was to "refrain from working" on Thomasville (Ex. A, Section 4).

Plaintiff is not entitled to any compensation under Section 5 of the Contract because Armstrong never requested plaintiff to intercede with Thomasville (Finding of Fact No. 26).

Likewise, Section 8 of the Contract does not support plaintiff's claim for compensation. The District Court specifically found that the Contract was terminated in good faith (Finding of Fact No. 16).

Outside of the Contract, the plaintiff cannot recover a fee or any other compensation. Where there exists an express contract there can be no

recovery on any theory of implied contract. Miller v. Schloss, 218 N.Y. 400, 406, 407, 113 N.E. 337 (1916); Larme Estates, Inc. v. Omnichrome Corp., 250 App. Div. 538, 540, 294 N.Y.S. 861 (1st Dept.), aff'd, 275 N.Y. 426, 10 N.E.2d 793 (1937); Hohenberg Co. v. Iwai New York, Inc., 6 App. Div. 2d 575, 180 N.Y.S.2d 410 (1st Dept. 1958). Even if such a right to recovery did exist, plaintiff contracted it away under Sections 1, 2 and 4 of the Contract.

Moreover, plaintiff disobeyed Armstrong's instructions to stay away from Thomasville (Finding of Fact No. 12), and therefore, was precluded from recovering any compensation. Neil & Parmalee Co. v. Kitchin, 219 App. Div. 853, 221 N.Y.S. 867 (4th Dept. 1927).

POINT 3

THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S REQUEST FOR A CONTINUANCE

At the close of the second day of trial, October 10, 1973, after plaintiff had rested and defendant was already well into presenting its case, plaintiff's counsel requested a continuance on the ground that plaintiff wished to be absent on October 11th and 12th.

Judge Levet denied the request, considering plaintiff's presence to be unnecessary. (354, 355) Plaintiff's counsel neither provided the District Court with a supporting affidavit or other material pertinent to the request for the adjournment nor in any way indicated that plaintiff's presence at the concluding day of trial was necessary. Also, no application or motion for a continuance to permit plaintiff to rebut was made.

The trial duly proceeded and was concluded the following day, October 11, 1973 in plaintiff's absence, although plaintiff was represented by his counsel, Mr. Lesch and Mr. Yassky, at all times during the proceedings. Judge Levet's opinion was subsequently filed on December 21, 1973.

A. Continuances Are Discretionary

It is well settled that "a federal trial judge has broad discretion in granting or denying a request for short continuances during the course of a trial." Winston v. Prudential Lines, Inc., 415 F.2d 619, 620 (2d Cir. 1969), cert. denied, 397 U.S. 918 (1970), citing Peckham v. Family Loan Co., 262 F.2d 422 (5th Cir. 1959).

In a recent case also decided by this Court, Napolitano v. Compania Sud Americana de Vapores, 421 F.2d 382 (2d Cir. 1970), the refusal by the trial judge to grant a short recess to accommodate a defense medical witness was held not to be an abuse of discretion. Judge Waterman wrote:

> "It does not seem to us that a request to interrupt a trial for a period of approximately one and a half hours, the request coming at a time when courts normally recess for lunch, is unreasonable. Had any one of us been in a position to exercise the discretion committed to a trial judge when such a request is made, we have no hesitancy in stating that the decision would have been otherwise; but as appellate judges we cannot find that the action of the district judge was so unreasonable or so arbitrary as to amount to a prejudicial abuse of the discretion necessary to repose in trial judges during the conduct of a trial." 421 F.2d at 384.

A similar result was reached in Sacharow v. Vogel, 428 F.2d 1389 (2d Cir. 1970), where it was held, again by this Court, that the trial judge did not abuse his discretion in denying plaintiff's request for an adjournment from noon on one day until the morning of the next day so that plaintiff's doctor could testify.

Clearly, in the case now before this Court the trial judge did not abuse his undisputed discretionary right to require that the trial proceed as scheduled. This Court has had occasion many times to note that

trial judges in the Southern District of New York are under great pressure to move their cases along and that unwarranted delays can wreak havoc with an orderly calendar.

In a recent case brought in the Southern District of New York, Davis v. United Fruit Co., 402 F.2d 328 (2d Cir. 1968), cert. denied, 393 U.S. 1085 (1969), plaintiff's counsel requested a continuance because the plaintiff could not be present at trial. The trial judge denied the request and ordered the trial to commence as scheduled. On appeal, this Court affirmed, Judge Kaufman pointing out that "the calendars of the Southern District are clogged and justice is being delayed or perhaps impaired as a result." He then continued:

> "In order to reduce this choking congestion, the district courts must be permitted to exercise their discretion in appropriate ways that will ensure justice to all who seek it. We will not interfere with the conscientious judge who will not accept the status quo of calendar congestion." 402 F.2d at 331, 332 (footnote omitted)

In another recent case brought in the Southern District of New York the plaintiff at trial moved at 4:25 p.m. Monday for a continuance until Tuesday so that a medical witness could testify. The trial judge

denied the motion, ordered a summing up, and sent the case to the jury. On appeal, this Court affirmed:

> "Plaintiff's second claim of error is based upon the refusal to permit the case to continue into Tuesday. Trial judges are given broad discretion in this area of trial control, and in view of the heavy congested docket in the Southern District of New York and the sincere efforts the judges of that court constantly make to move the docket along, we would perhaps, even under different circumstances, be reluctant to hold that Judge McMahon abused his discretion here despite the fact it seems to us very little by way of expeditious disposition of cases was gained by the judge's ruling." Vitarelle v. Long Island R.R. Co., 415 F.2d 302 (2d Cir. 1969).

Similarly, this Court should not now disturb on appeal Judge Levet's ruling that the trial proceed as scheduled.

B. Plaintiff Was Not Prejudiced By The Court's Ruling

Plaintiff claims on appeal that he was prejudiced by Judge Levet's ruling because he was deprived of the opportunity personally to present certain rebuttal evidence.

Without citing a single case, plaintiff argues that had he been present on the final day of trial he would have been able to testify that there was no meeting between him and Mr. Binns on July 22, 1966. Plaintiff, however, had already so testified on the

first day of trial during both direct and cross examination* (Samuels 31,97), and it is well settled that mere cumulative evidence is to be excluded by the trial court. Voltmann v. United Fruit Co., 147 F.2d 514 (2d Cir. 1945); Murphy v. Dyer, 409 F.2d 747 (10th Cir. 1969).

Moreover, the precise date of the Binns-Samuels meeting was unimportant. Both Mr. Binns and Mr. Samuels testified that there was such a meeting and testified at length about what they discussed there. (Binns 416, Samuels 31).

Plaintiff, of course, does not argue that he had an absolute right to be continually present during the trial, and it it clear that there is no such right of any party in a civil action. Davis v. United Fruit Co., supra, (plaintiff absent); Gaspar v. Kassm, 60 F.R.D. 22 (E.D. Pa. 1973) (defendant absent).

Appendix at 14e, 14K, 14Z and 14cc

* This is no case of surprise. Armstrong pointed out several times in its Trial Brief (-) that Mr. Binns would testify that July 22, 1966 was the date he first met plaintiff. In addition, a copy of Mr. Binns' expense voucher (Ex. 24) which supports his testimony was given to plaintiff several months prior to trial.

The record clearly shows that plaintiff was represented by his counsel, Mr. Lesch and Mr. Yassky, throughout the entire trial and that plaintiff himself, an attorney, played no part in the trial other than to testify on his own behalf. On this appeal, however, plaintiff is now claiming that Mr. Lesch was actually unfamiliar with the case since he was only plaintiff's "recently assigned trial counsel." In support of this theory, plaintiff cites a portion of the transcript of the pretrial conference held on September 17, 1973, some three weeks before commencement of the trial. Plaintiff's citation, however, is taken out of context and is misleading since Mr. Lesch specifically told the trial judge at the September 17th conference:

> "I read all the depositions and the exhibits in the case, and I am familiar with it now." (Transcript, pretrial conference of September 17, 1973, p. 3).

In any event, this pretrial conference was more than three weeks before commencement of the trial, and furthermore, Mr. Lesch's firm, Shea, Gould, Climenko & Kramer, had been representing plaintiff and handling his case ever since the commencement of the action in 1969. The one case cited by plaintiff, Smith-Weik Machinery Corp. v. Murdock Mach. & Eng. Co., 423 F.2d

842 (5th Cir. 1970), is inapposite since there it was defendant's principal counsel, not the party, who was absent, and the court based its decision in that case on the desirability of having the defendant adequately represented by counsel. Indeed, the court in Smith-Weik was careful to stress that its conclusion did "not undermine the rule in this [5th] Circuit that the granting or refusal of a continuance is a matter of judicial discretion and the trial court's judgment will not be reversed unless abuse is shown." 423 F.2d at 844.

In the case now before this Court, the trial judge not only did not abuse his discretion but rather should be commended for his diligence in moving the case along, particularly where plaintiff had already rested, had made no request for rebuttal, was at all times represented by counsel, and where defendant, whose five witnesses had traveled to New York from out of state, had nearly completed presentation of its case.

V.

CONCLUSION

It is submitted that the part of the District Court's judgment appealed from should be affirmed.

Dated: New York, New York
December 6, 1974

Respectfully submitted,

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